FILE COPY

JAN 6 1942

No. 206

In the Supreme Court of the United States

OCTOBER TERM, 1941

D'OENCH, DUHME & CO., INC., A CORPORATION, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Summary of argument	7
Argument	15
Introductory	15
I. The court below was correct in applying the law of Illinois, assuming that such law did not need to be pleaded or proved	17
II. The court below properly took judicial notice of the law of Illinois without plea or proof notwithstanding the Missouri rule that judicial notice may be taken of the laws of sister states only if pleaded	22
A. The federal courts have heretofore taken judicial notice of the laws of the several states. As a general rule the state courts of Missouri, however, may notice the laws of a sister state only if pleaded	23
B. The doctrine of *Erie R. Co.* v. *Tompkins* did not preclude the courts below from taking judicial notice of the Illinois law in accordance with traditional federal practice	27
1. The Missouri statute abrogated the common law requirement that the laws of sister states must be proved by the introduction of evidence and left only the pleading requirement, which is inapplicable in the federal courts	29
2. Even if the abrogation of the Missouri common law rule of proof is conditioned upon the pleading of sister state law, the *Tompkins* doctrine did not preclude the federal courts from taking judicial notice of the Illinois law	34
III. Petitioner is estopped to deny liability on the note	45
1. Petitioner is estopped under federal statutory law	48
2. Petitioner is estopped also under Illinois law which the courts of Missouri would be bound to apply	54

435396—42——1

Page

Conclusion 57
Appendix 59

CITATIONS

Cases:

Adam v. *Saenger*, 303 U. S. 59 24
Adamson v. *Fogelstrom*, 221 Mo. App. 1243 25
Alaska Packers Association v. *Commission*, 294 U. S. 532 56
Awotin v. *Atlas Exchange National Bank*, 295 U. S. 209 51
Banchor v. *Gregory*, 9 Mo. App. 102 ..... 25, 31
Bank v. *Schmidt*, 168 Mo. App. 153 16
Bank of Slater v. *Union Station Bank*, 283 Mo. 308 48
Banks v. *Burnam*, 61 Mo. 76 40
Bauserman v. *Blunt*, 147 U. S. 647 33
Board of County Commissioners of County of Jackson v. *United States*, 308 U. S. 343 ..... 18, 51
Bothwell v. *Buckbee, Mears Co.*, 275 U. S. 274 ..... 46, 55
Bowen v. *Johnston*, 306 U. S. 19 ..... 23, 24, 37
Bradford Electric Co. v. *Clapper*, 286 U. S. 145 56
Brady v. *Daly*, 175 U. S. 148 ..... 33, 43
Brown v. *Piper*, 91 U. S. 37 ..... 23, 37
Campbell v. *Haverhill*, 155 U. S. 610 ..... 33, 43
Cantley v. *Plattner*, 228 Mo. App. 411 21
Carson National Bank v. *American National Bank*, 225 Mo. App. 948 19
Case v. *Kelly*, 133 U. S. 21 38
Central Republic Trust Co. v. *Evans*, 307 Ill. App. 605 ..... 14, 55
Charlotte v. *Choteau*, 25 Mo. 465 25
Charlotte v. *Choteau*, 33 Mo. 194 ..... 25, 26, 40
Chastleton Corp. v. *Sinclair*, 264 U. S. 543 ..... 37, 39
Chattanooga Foundry v. *Atlanta*, 203 U. S. 390 43
Cheever v. *Wilson*, 9 Wall. 108 23
Chicago Title & Trust Co. v. *Brady*, 165 Mo. 197 ..... 48, 57
Cobb v. *The Griffith & Adams Co.*, 87 Mo. 90 25
Coca-Cola Bottling Co. v. *Munn*, 99 F. (2d) 190 29
Coleman v. *Lucksinger*, 224 Mo. 1 25
Course v. *Stead*, 4 Dall. 22 23
Covington Drawbridge Co. v. *Shepherd*, 20 How. 227 38
Cray, McFaun & Co. v. *Hegarty & Co.*, 27 F. Supp. 93 23
Crohn v. *U. C. T.*, 170 Mo. App. 273 20
Curtis v. *Martin*, 2 N. J. L. 377 56
Davis v. *McColl*, 179 Mo. App. 198 19
Deitrick v. *Greaney*, 309 U. S. 190 ..... 13, 18, 45, 47, 50, 52, 53, 55
Dimmick v. *Tompkins*, 194 U. S. 540 40
Elgin National Bank v. *Goecke*, 213 Ill. App. 559 16
Elwood v. *Flannagan*, 104 U. S. 562 23
Erie R. Co. v. *Tompkins*, 304 U. S. 64 ..... 9, 17, 22, 24, 27, 28, 31, 33, 39
Farmers Bank v. *Harris* (Mo. App.), 250 S. W. 946 ..... 16, 21, 57
Fidelity Trust Co. v. *Field*, 311 U. S. 169 28

Cases—Continued. Page

Flato v. *Mulhall*, 72 Mo. 522 25
Ford v. *Ford Roofing Products Co.* (Mo. App.), 285 S. W. 538 ..... 16, 21
Foreman Trust & Savings Bank v. *Cohn*, 342 Ill. 280 16
Fourth National Bank v. *Francklyn*, 120 U. S. 747 23
Franklin Bank v. *St. Louis Car Co.*, 321 Mo. 199 16
Freshman v. *Atkins*, 269 U. S. 121 40
Gallup v. *Caldwell*, 120 F. (2d) 90 23
Gardner v. *The Collector*, 6 Wall. 499 37
Golden v. *Cervenka*, 278 Ill. 469 ..... 14, 52, 54
Gorman v. *Terminal Ry. Co.*, 325 Mo. 326 27
Gormley v. *Bunyan*, 138 U. S. 623 23
Gasquet v. *Lapeyre*, 242 U. S. 367 45
Griffin v. *McCoach*, 313 U. S. 498 ..... 17, 18
Hanley v. *Donoghue*, 116 U. S. 1 ..... 23, 24
Hansen v. *Duvall*, 333 Mo. 59 21
Hauck Clothing Co. v. *Sharpe*, 83 Mo. App. 385 19
Hawkins v. *Barney's Lessee*, 5 Pet. 457 33
Herron v. *Southern Pacific Co.*, 283 U. S. 91 36
Iglehart v. *Todd*, 203 Ind. 427 53
Illinois Fuel Co. v. *M. & O. R. R. Co.*, 319 Mo. 899, certiorari denied, 278 U. S. 640 20
John Hancock Ins. Co. v. *Yates*, 299 U. S. 178 56
Johnston v. *Gautry*, 83 Mo. 339, affirming 11 Mo. App. 322 ..... 19, 20
Jones v. *United States*, 137 U. S. 202 39
Karr v. *Jackson*, 28 Mo. 316 56
Klaxon Co. v. *Stentor Co.*, 313 U. S. 487 ..... 7, 17, 18, 28, 33, 42, 56
Knass v. *Madison & Kedzie Bank*, 354 Ill. 554 55
Lamar v. *Micou*, 114 U. S. 218 ..... 23, 37
Leland v. *Wilkinson*, 6 Pet. 317 38
Lewis v. *McMahon & Co.*, 307 Mo. 552 48
Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397 24
Long v. *Long*, 141 Mo. 352 19
Loranger v. *Nadeau*, 215 Cal. 362 30
Lowry v. *Fire Ins. Co.*, 219 Mo. 121 ..... 25, 26, 31
Machine Co. v. *Tomlin*, 174 Mo. App. 512 19
Massa v. *Huehneroff* (Mo. App.), 59 S. W. (2d) 723 ..... 16, 21
Mason v. *United States*, 260 U. S. 545 33
McClaine v. *Rankin*, 197 U. S. 154 43
McDonald v. *Life Ass'n*, 154 Mo. 618 ..... 25, 31
McElmoyle v. *Cohen*, 13 Pet. 312 33
McNiel v. *Holbrook*, 12 Pet. 84 ..... 32, 38, 44
Meyer v. *McCabe*, 73 Mo. 236 25
Miller v. *Larned*, 103 Ill. 562 16
Mills v. *Green*, 159 U. S. 651 23
Menard v. *Goltra*, 328 Mo. 368 ..... 27, 28
Modern Woodmen of America v. *Mixer*, 267 U. S. 544 56
Motor Co. v. *Warren*, 113 Kansas 44 41

Cases—Continued. Page

National Fire Ins. Co. v. *Thompson*, 281 U. S. 331 40
Neef v. *Potter*, 226 Ill. 628 16
Neff v. *Sovereign Camp W. O. W.*, 48 S. W. (2d) 564 ..... 27, 30
Niblack v. *Farley*, 286 Ill. 536 ..... 14, 55
Norman v. *Insurance Co.*, 237 Mo. 576 25
Ohio v. *Hinchman*, 27 Pa. 479 56
O'Sullivan v. *Felix*, 233 U. S. 318 43
Owings v. *Hull*, 9 Pet. 607 ..... 23, 38
Pacific Ins. Co. v. *Commission*, 306 U. S. 493 56
Patton v. *United States*, 281 U. S. 276 37
Pennington v. *Gibson*, 16 How. 64 ..... 23, 41
Phoenix Mutual Life Ins. Co. v. *Simons*, 52 Mo. App. 357 19
Pink v. *A. A. A. Highway Express, Inc.*, No. 48, this Term, decided December 8, 1941 56
Railroad Co. v. *Bank of Ashland*, 12 Wall. 226 38
Ramey v. *Mo. Pac. R. R. Co.*, 323 Mo. 662 ..... 26, 27, 31
Rashall v. *Railroad*, 249 Mo. 509 ..... 25, 31
Renaud v. *Abbott*, 116 U. S. 277 55
Richards v. *Richards*, 270 Mass. 113 30
Roberts v. *Reilly*, 116 U. S. 80 23
Royal Indemnity Co. v. *United States*, 313 U. S. 289 18
Ruhlin v. *N. Y. Life Ins. Co.*, 304 U. S. 202 28
St. Joseph Water Co., State ex rel. v. *Eastin*, 270 Mo. 193 40
Sampson v. *Channell*, 110 F. (2d) 754 29
Savannah Ry. v. *Evans*, 121 Ga. 391 30
School of Osteopathy v. *Turner*, 143 Mo. App. 416 ..... 19, 20
Sibbach v. *Wilson & Co.*, 312 U. S. 1 ..... 28, 32, 33
Siemans & Halski Electric Co. v. *Ten Brock*, 97 Mo. App. 173 21
Sims v. *Hundley*, 6 How. 1 32
Slaughter v. *Railroad*, 116 Mo. 269 25
Sloan v. *Terry*, 78 Mo. 623 25
South Missouri Land Co. v. *Rhodes*, 54 Mo. App. 129 19
State Bank v. *Forsyth*, 41 Mont. 249 53
Swift v. *Tyson*, 16 Pet. 1 24
Tennant v. *Insurance Co.*, 133 Mo. App. 345 19
Tilden v. *Blair*, 21 Wall. 241 20
Town of South Ottawa v. *Perkins*, 94 U. S. 260 ..... 24, 37, 38
Union Pacific Railway v. *Wyler*, 158 U. S. 285 ..... 23, 31
United States v. *Eckford*, 6 Wall. 484 ..... 32, 33
United States v. *Turner*, 11 How. 662 24
Vance v. *Campbell*, 1 Black 427 43
Waggaman v. *General Finance Co.*, 116 F. (2d) 254 22
Walker v. *Dunham*, 135 Mo. App. 396 21
Wayman v. *Southard*, 10 Wheat. 1 ..... 32, 33
Wright v. *Bales*, 2 Black 535 43

Statutes:	Page
Act of June 19, 1934 (48 Stat. 1064, 28 U. S. C. 723)	32
Banking Act of 1935 (49 Stat. 713, 12 U. S. C. 264)	49
Conformity Act (R. S. sec. 914, 28 U. S. C. sec. 724)	31
Federal Reserve Act, Sec. 12B, as added by Section 8 of the Banking Act of 1933, 48 Stat. 162	59
Laws (Missouri) 1927, p. 156; R. S. 1929, sec. 806	26
Mo. Rev. Stat. 1929, secs. 1649, 5388	40
Mo. Rev. Stat. 1929, sec. 806	62
Process Acts of 1789 and 1792 (1 Stat. 93, 275–276)	32, 42
Revised Statutes secs. 905–906, 28 U. S. C. 687–688	55
12 U. S. C. 264 (d)	19
12 U. S. C. 290	19
Miscellaneous:	
Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 Yale L. J. 62	33, 41
Cook, *"Substances" and "Procedure" in the Conflict of Laws*, 42 Yale L. J. 333	29
Federal Deposit Insurance Corporation Annual Report, 1934	52, 53
Federal Rules of Civil Procedure	10, 32, 33, 35
46 Harv. L. Rev. 1019 (note)	41
Moore, *Federal Practice* (1938), p. 36, 41–42	32
Restatement of Conflict of Laws:	
Sec. 320	20
Restatement of the Law of Torts, § 321	54
Simkins, *Federal Practice*, pp. 9–10	33
Thayer, *Law and Fact in Jury Trials*, 4 Harv. L. Rev. 147	44
Tunks, *Categorization and Federalism*, 34 Ill. L. Rev. 271, 278i, 282, 301	29
Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49	43
Wigmore, *Evidence* (3d Ed.), sec. 5, sec. 1684	33, 40

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 206

D'OENCH, DUHME & CO., INC., A CORPORATION,
PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, A
CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The judgment of the District Court of the United States for the Eastern District of Missouri (R. 72) was entered without an opinion. The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 87–94) is reported in 117 F. (2d) 491.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was

entered on February 11, 1941 (R. 94). A petition for rehearing was denied on March 27, 1941 (R. 99). The petition for a writ of certiorari was filed June 25, 1941, and was granted October 13, 1941. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Respondent brought suit in the federal court in Missouri on an accommodation note dated and made payable in Illinois. The note was given by petitioner for the purpose of having it appear as a live asset of the payee, an Illinois bank which subsequently was insured by respondent. The bank assigned the note to respondent as collateral for a loan. Applying Illinois law without plea or proof thereof, the court below held for respondent. The questions are:

1. Whether the failure of the court below expressly to find the Missouri rule as to choice of law is error requiring a remand when the rule applied is the same as that of the Missouri courts.

2. Whether the court below was precluded from taking judicial notice of the Illinois law by reason of the Missouri rule that judicial notice may be taken of the laws of sister states only when pleaded.

3. Whether petitioner is estopped to deny liability on the note.

STATUTE INVOLVED

The pertinent portions of Section 12B of the Federal Reserve Act are set forth in the Appendix, *infra*, pp. 59–61.

STATEMENT

The respondent, Federal Deposit Insurance Corporation, brought suit in the United States District Court for the Eastern District of Missouri upon a promissory note for $5,000 executed by the petitioner (R. 3–4). The note had been assigned to the respondent by the payee, Belleville Bank & Trust Company, hereinafter called the bank (R. 13). The petitioner answered, alleging that the note was accommodation paper given to the bank without consideration, that the respondent had acquired title to the note after maturity, and that it was not a holder in due course (R. 6–9). By leave of court respondent replied, denying the alleged lack of consideration and asserting that petitioner was estopped to raise the defense because the note was furnished for the purpose of deceiving the creditors of the bank, state banking authorities, and respondent, as to the true condition of the bank (R. 10). The District Court rendered judgment for the respondent and the court below affirmed (R. 94).

The facts as found by the District Court may be stated as follows:

Petitioner is a Missouri corporation engaged in the investment security business with principal

office and place of business in St. Louis (R. 66, 68). In 1918 and 1920 petitioner sold to the bank drainage district bonds in the amount of $5,000, which matured August 1, 1926. Upon maturity the bank forwarded the bonds to petitioner to be presented for payment, and the bonds were dishonored by reason of no funds. The cashier of the bank, which was a steady customer of petitioner and continued to be such (R. 42, 52, 68), then requested petitioner to execute two notes payable to the bank in the respective amounts of $2,000 and $3,000, which would enable the bank to carry the notes and not show any past due bonds in the bank. Petitioner, by Herman Duhme, who was then petitioner's vice-president and who was its president at the time of the trial, executed two collateral demand notes, each dated August 1, 1926, and payable to the bank. Duhme knew that the notes were executed for the reason that the bank did not want its assets to show any past due bonds (R. 71). The notes were signed at petitioner's office in St. Louis, Missouri, were by their terms made payable at petitioner's office there, and were delivered to the payee at Belleville, Illinois (R. 75). One of the notes was for $2,000, bearing 6 percent interest; the other note was for $3,000, bearing interest at 5½ percent. The collateral agreement of each note recited that a corresponding amount of the defaulted drainage district bonds was pledged as security (R. 68). Under date of August 4, 1926, the bank, by its assistant cashier, acknowledged in writ-

ing receipt of the two demand notes. There was appended to each of the receipts the following statement: "This note is given with the understanding it will not be called for payment. All interest payments to be repaid." These receipts were not attached to the notes, but were delivered to petitioner and retained in its possession (R. 69). A search of the records of the bank in August 1938 failed to disclose any copies of the receipts (R. 69).

From August 1926 until March 1932, petitioner paid the bank interest amounting to $1,601.56. The interest payments were made by petitioner's officers so as to keep the two notes as live paper (R. 69–70, 71). One or more renewal notes were given prior to the execution of the note upon which the instant suit was brought (R. 70). This note (R. 13), dated Belleville, Illinois, January 1, 1933, was in the principal sum of $5,000, bearing interest at the rate of 6 percent, and was payable on demand at the office of the bank at Belleville, protest, presentment, and notice being waived (R. 66–67). The evidence did not disclose where the note was signed (R. 75), but it was signed in compliance with a request made to petitioner by a representative of the bank that inasmuch as the existing note or notes had become too old a new note should be executed (R. 70). On July 29, 1935, the bank charged the note off as an asset (R. 70). Thereafter on July 30, 1937, the bank sold the defaulted bonds for $100, and that amount later was credited by respondent to interest due on the note (R. 70).

On or about April 2, 1938, the bank borrowed from respondent the sum of $1,349,558.07, giving a demand note and pledging certain collateral as security therefor, including the note here involved, which the bank indorsed without recourse to the order of the respondent (R. 67). The uncontradicted evidence shows that the loan was made as a means of satisfying the respondent's liability to depositors of the bank under the insurance granted by it in 1934 (R. 62–64). The entire proceeds of the loan were, according to the agreement, turned over to the First National Bank of Belleville which assumed the liabilities of the bank (R. 67). The bank failed to pay its loan to the respondent on demand, and, under the terms of the loan, respondent was empowered to collect in its own name all collateral securing the debt (R. 67). In August 1938, the respondent made demand upon petitioner for payment of the note in suit (R. 67). Payment was refused and respondent for the first time was advised that the note had been given without consideration and with the understanding that it would not be called for payment and that all interest payments would be restored (R. 67, 69, 71).

The District Court, after finding the foregoing facts, concluded that the respondent was an innocent holder in good faith and for value, that the defense of lack of consideration was not proved to the satisfaction of the court, and that under the facts of the case the petitioner was estopped to

assert lack of consideration (R. 71). Thereafter, the court entered additional conclusions of law holding that the note sued on constituted a new contract between the parties, and that the rights of the parties on the notes were governed by the law of Illinois (R. 75). It thereupon entered judgment for the respondent in the sum of $5,000, with interest thereon from May 1, 1933, and 10 percent of the principal and interest as attorney fees, pursuant to a provision in the note (R. 13), making the total judgment $7,376.41 (R. 71–72). On appeal the Circuit Court of Appeals for the Eighth Circuit affirmed, holding that the note was governed by the law of Illinois, and that under such law respondent was a holder in due course (R. 87–94).

SUMMARY OF ARGUMENT

The questions involved in this case arise from petitioner's contention that the note sued upon was an accommodation note and that the defense of lack of consideration is good as against respondent. If Missouri law is applicable, respondent is not a holder in due course, the note having been negotiated too late, and the alleged defense is valid assuming that petitioner is not estopped to assert it. However, if the law of Illinois is applicable, as was held by the court below, a contrary result must be reached.

I

In *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, decided subsequent to the decision of the court below,

this Court held that the federal courts must apply the conflicts of law rule of the state of the forum. The court below did not find the choice of law rule of Missouri, but it in fact applied it in holding that the law of Illinois was controlling. Hence its error in not specifically finding the Missouri rule was harmless. The local decisions showing that the law of Illinois would be applied in the Missouri courts avoid any occasion for this Court to remand the case for the Missouri conflicts rule to be considered in the first instance by the court below.

The note in suit was dated, made payable, and presumably delivered in Illinois. The Missouri decisions permit of no doubt that such a note is controlled by Illinois law. Although the original notes executed in 1926 were signed and made payable in Missouri, such fact is immaterial. Since they were found to have been delivered in Illinois, it is probable that they were governed by the law of that state; and if they were governed by Missouri law, it would not follow that the note in suit, as a renewal note, also would be. The original notes never were negotiated and the note in suit, which was negotiated, contained different provisions.

II

In this case the law of Illinois was neither pleaded nor proved by formal evidence. The petitioner contends that since the state courts of Missouri will not notice the laws of a sister state

unless they are pleaded, the federal courts may not do so because of the rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. The contention is without substance. The principle of uniformity of decision in coordinate federal and state courts, which underlies the *Tompkins* doctrine, does not require that the federal courts be denied power to take judicial notice of a state law which would not be noticed in the state courts of the forum and the Missouri rule and the grounds on which it proceeds have no application in the federal courts.

In the federal courts both the "existence" and the interpretation of state law are for the determination of the court. And since a law of any state is regarded as a "domestic" law, its "existence" may be judicially noticed without plea or proof. Announced by this Court more than a century ago, the rule has been consistently enforced both before and since the decision in the *Tompkins* case.

Under the Missouri common law rule, the law of a sister state, like that of a foreign country, is a "fact," and save as otherwise provided by statute, must be proved, apparently to the jury. Because it is a fact which may not be noticed, it must also be pleaded to the extent required by local practice with respect to fact pleading generally. Undoubtedly, the origin of the rule is to be found in the fact that copies of the relevant statutes and decisions were at one time not readily accessible to the local courts. In recognition of

present-day conditions, Missouri in 1927 enacted a statute permitting judicial notice to be taken of sister state law. The statute, however, retains the "archaic" pleading requirement and where this requirement has not been waived, the state courts reluctantly do not notice the laws of other states.

1. Under the Missouri statute, as construed by the local courts, the pleading requirement and the provision for judicial notice of sister state laws without formal proof are separable. In this view, the question whether a local rule as to judicial notice of a sister state law is binding in the federal courts is not critical, since the state rule is the same as that which the federal courts have always applied. And the local rule that a law of a sister state must be pleaded, like other local rules of pleading, is not controlling in the federal courts.

The Conformity Act has never been construed to require that the federal courts follow local practice on the pleading of the law of a sister state and there is no occasion now to give the Act such a construction. And the Rules of Decision Act has no application to matters of pleading. Moreover, the Federal Rules of Civil Procedure establish the exclusive rule in matters of pleading in the federal courts and any inconsistent statute making state law applicable is to this extent repealed.

2. Even if it be assumed that pleading a sister state law is a necessary condition of judicial notice of such law in Missouri state courts, the *Tompkins* rule does not preclude the federal courts in Missouri from noticing the laws of Illinois.

(a) Questions in the federal courts as to the existence and construction of any state law are matters for the judge rather than jury. Neither the Conformity Act nor the Rules of Decision Act requires the application of a contrary state law regulating the relative functions of the court and jury in the federal courts. On like principle, the federal courts may consult the usual sources even though the state courts would not trouble to do so without formal proof. Particularly is this so since the question whether judicial notice shall be taken ultimately depends on whether the reports and books usually resorted to in ascertaining the law involved are readily accessible to the particular court charged with the duty of making the inquiry. The application of the local rule would result in manifest absurdities, since it could not be justified on any principle not equally applicable to the proof of federal laws or of the "facts" of the law on which the decision of federal questions may depend.

(b) If any state law is to be applied, it should be the law of the state whose substantive law is involved, here Illinois. The Rules of Decision Act declares that state laws shall be deemed rules of

decision only "in cases where they apply" and, unlike statutes directing that state practice and procedure be followed, does not expressly direct the application of the law of the forum. In a diversity case involving a conflict of two valid state laws the purpose of the Constitution to provide equality of justice to non-citizens, and not inequality to citizens normally requires that a federal court administer the law of the state in which it sits. But decisions of this Court illustrate that these considerations of policy are not of universal application. Certainly if the rule of any state has practical relevance to judicial notice in the federal courts, it is the rule of the state whose substantive law is involved.

(c) The result should be the same even if the Rules of Decision Act requires the choice of the *lex fori* wherever state law is applicable. If the Act does require such choice, the local law permitting judicial notice of "domestic" laws might nevertheless be applied in the view that every state law is a "domestic" law in the federal courts. Each state, although sovereign and independent of each other, is a component part of the Union and each bears the same legal relationship to the Federal Government. The federal courts in Missouri may therefore be presumed to know the law of every state and, with proper assistance in refreshing their judicial recollection, may ascertain the law of Illinois as readily as that of Missouri.

III

As was held by the district court, petitioner is estopped to deny liability on the note in controversy.

1. The Federal Deposit Insurance Corporation was established under Section 12B of the Federal Reserve Act, enacted as part of the Banking Act of 1933. The original subdivision (y) thereof provided that prior to the granting of insurance to a state bank not a member of the Federal Reserve System, the respondent should make an examination of the financial affairs of the bank to ascertain its solvency and should obtain a certificate of solvency from the local state banking authorities. It also authorized the respondent to make examinations subsequent to the issuance of insurance. The policy of Section 12B condemns the transaction here involved and requires that petitioner be estopped to assert that the note was given without consideration or with the understanding that it would not be collected.

This would be plainly so if the note had been executed after the passage of Section 12B. *Deitrick* v. *Greaney*, 309 U. S. 190. Petitioner's agent and vice president understood that the bank desired the note in order to have it instead of the dishonored bonds showing on its books. The purpose of the provisions for examinations by respondent and the furnishing of certificates of solvency by the state authorities would be defeated

if the true financial status of the bank could thus be concealed. By necessary implication, therefore, the statute would have condemned petitioner's and the bank's action and precluded resort to the defense of lack of consideration as against respondent.

In the circumstances it is immaterial that the note in suit was executed shortly before the passage of Section 12B. Under familiar legal principle, which may be invoked in construing the reach of the federal statute, petitioner was under a duty to warn respondent or otherwise assure that it would not be deceived. Yet petitioner did not do so. Moreover, the provision requiring respondent to obtain state certificates of solvency before insuring banks manifests the Congressional purpose to extend the reach of the implied condemnation to prior acts having an "evil tendency" to deceive the state authorities.

2. Petitioner is also estopped to deny liability under Illinois law and the courts of Missouri are required to enforce the Illinois law. The Illinois rule is the same as we urge the federal rule to be and is implied from the purpose and policy of the state banking statutes. *Golden* v. *Cervenka*, 278 Ill. 409 (1917); *Niblack* v. *Farley*, 286 Ill. 536, 540 (1919); *Central Republic Trust Co.* v. *Evans*, 307 Ill. App. 605, 641–643 (1940). State statutes are "public acts" within the purview of the Full Faith and Credit Clause, and, as construed by the local

courts, must be given effect in other states having no conflicting policy of their own. Missouri has no interest in protecting its residents participating in the deception of those dealing with Illinois banks sufficient to permit the Missouri courts to hold that petitioner is not estopped.

ARGUMENT

INTRODUCTORY

The conflicts of law and other questions involved in this case arise from petitioner's alleged defense that the note sued upon was given by it without consideration. Such defense, it is said, is good as against respondent for the reason that, under the law of Missouri, respondent is not a holder in due course, the note, a demand note, having been negotiated more than five years after issuance. Although the district court was not satisfied that petitioner had sustained its burden of proving lack of consideration (R. 71), the court below treated the note as one for the bank's accommodation (R. 88–94). For present purposes we assume that the court below was correct in so doing.[1]

In addition, we concede that under the law of Missouri the defense of absence of consideration

[1] The principal evidence introduced by petitioner to show absence of consideration, aside from the testimony of its own witnesses, was the agreement by the assistant cashier of the bank not to call for payment and to repay interest (R. 68–69).

is good except as against a holder in due course,[2] and that a holder of a demand note negotiated as long as five years after issuance is not a holder in due course.[3] Thus, if the Missouri law were applicable, respondent would not be entitled to collect on the note, assuming contrary to our final contention (*infra*, pp. 44–57), petitioner is not estopped to raise its defense.

On the other hand, if the law of Illinois is controlling, as was held by the courts below, the defense of lack of consideration would not be available. For in Illinois the transferee for value of accommodation paper takes it discharged of any defense of lack of consideration which the maker might have had as against the party accommodated, whether or not it was negotiated after maturity and whether or not the transferee had notice of the absence of consideration.[4] Neither in the court below nor in its petition for certiorari did petitioner contend that the law of Illinois is not as stated.

---

[2] *Farmers Bank* v. *Harris* (Mo. App.), 250 S. W., 946 (1923); *Ford* v. *Ford Roofing Products Co.* (Mo. App.), 285 S. W. 538 (1926); *Massa* v. *Huchneroff* (Mo. App.), 59 S. W. (2d) 723 (1933).

[3] *Franklin Bank* v. *St. Louis Car Co.*, 321 Mo. 199 (1928); *Bank* v. *Schmidt*, 168 Mo. App. 153 (1912).

[4] *Miller* v. *Larned*, 103 Ill. 562 (1882); *Neef* v. *Potter*, 226 Ill. 628 (1907); *Elgin National Bank* v. *Goecke*, 213 Ill. App. 559 (1919); *Foreman Trust & Savings Bank* v. *Cohn*, 342 Ill. 280 (1930).

It is evident, therefore, that apart from the question of estoppel, the outcome of this case is dependent upon the issue with respect to choice of law. We show under Point I that the court below was correct in applying Illinois law. Under Point II we show that this is true notwithstanding that Illinois law was not pleaded as would have been required if the action had been brought in a Missouri state, instead of federal, court.

I

THE COURT BELOW WAS CORRECT IN APPLYING THE LAW OF ILLINOIS, ASSUMING THAT SUCH LAW DID NOT NEED TO BE PLEADED OR PROVED

In *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, this Court held that the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, required that in diversity of citizenship cases, at least, the federal courts must apply the conflicts of law rule of the forum. The court below decided the instant case prior to that holding, and in its opinion it did not consider the Missouri rule as to the choice of law governing petitioner's obligation. We submit, however, that such failure was harmless error at most, and that it does not require that the case be remanded. Cf. *Griffin* v. *McCoach*, 313 U. S. 498, 503–504. This is so even assuming that the *Klaxon* decision is applicable in suits such as the instant where the federal jurisdiction is

based upon an act of Congress (Federal Reserve Act, Sec. 12B (j), Appendix, *infra*, pp. 58–59), rather than upon diversity of citizenship, and where the suit is brought by a corporate agency or instrumentality of the United States.[8]

That the error, if any, was harmless appears from the fact that the Missouri choice of law rule, if it had been found and followed, would have led to the same result as was reached by the court below, namely, the application of Illinois law and consequent recovery by respondent. The pertinent decisions of the Missouri courts seem sufficiently clear on the point not to call for exercise of this Court's discretion to remand the case for them to be considered in the first instance by the court below pursuant to the course followed in the *Klaxon* and *Griffin* cases.

Thus in Missouri, as generally elsewhere, in the absence of evidence that the parties intended otherwise, the law of the place of contracting determines the obligation of a promisor.[9] Under the Missouri

---

[8] There is nothing in the Federal Reserve Act or Banking Act of 1933 which suggests that the *Tompkins* doctrine is applicable herein, and *Deitrick* v. *Greaney*, 309 U. S. 190, suggests that it may be inapplicable generally in the field of federal banking. It may also be inapplicable in suits in which the United States is a party. *Board of County Commissioners of County of Jackson* v. *United States*, 308 U. S. 343, 350, 352; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289. But see *infra*, p. 43. If so,

decisions the place of contracting in the instant case was Illinois, since the note sued upon was dated at Belleville, Illinois, was payable at the bank there, and presumably was delivered at the same place (R. 13, 19–20). Whether any one or two of these circumstances would alone be determinative and, if so, which, need not be specified, for it is clear that in combination they more than suffice. *South Missouri Land Co.* v. *Rhodes*, 54 Mo. App. 129, 133 (1893); *Hauck Clothing Co.* v. *Sharpe*, 83 Mo. App. 385 (1900); *Machine Co.* v. *Tomlin*, 174 Mo. App. 512, 520 (1913); *Carson National Bank* v. *American National Bank*, 225 Mo. App. 948 (1930); *Johnston* v. *Gawtry*, 83 Mo. 339 (1884); *Phoenix Mutual Life Ins. Co.* v. *Simons*, 52 Mo. App. 357 (1893); *Tennant* v. *Insurance Co.*, 133 Mo. App. 345, 352 (1908); *School of Osteopathy* v. *Turner*,

---

the same may be true of suits in which the respondent is a party. The respondent is managed by a board of directors appointed by the President by and with the advice and consent of the Senate. More than 50 per cent of its stock is held directly by the Treasury of the United States. 12 U. S. C. 264 (d). The remaining stock is held by the Federal Reserve banks but does not vote and carries no dividends and is beneficially owned by the United States. 12 U. S. C. 290.

[6] *Johnston* v. *Gawtry*, 83 Mo. 339, 343 (1884), affirming 11 Mo. App. 322, 330 (1882); *Long* v. *Long*, 141 Mo. 352, 372–373 (1897); *Illinois Fuel Co.* v. *M. & O. R. R. Co.*, 319 Mo. 899, 923 (1928), certiorari denied, 278 U. S. 640; *Davis* v. *McColl*, 179 Mo. App. 198, 202, 207 (1914).

143 Mo. App. 416, 417 (1910); *Crohn* v. *U. C. T.*, 170 Mo. App. 273, 279 (1913).[7]

In the court below and in its reply to the respondent's brief in opposition to the petition for certiorari, petitioner's sole answer to the foregoing was that the note in suit was a renewal note and that therefore it was controlled by the same law as was applicable to the original notes of August 1, 1926. There are two answers to this contention. First, it is probable that under the choice of law rule of Missouri, petitioner's obligation on the original notes, as well as on the note in suit, was governed by Illinois law since, although signed and made payable in Missouri, they were found to have been delivered in Illinois (R. 75). See *Johnston* v. *Gawtry*, 83 Mo. 339 (1884); *School of Osteopathy* v. *Turner*, 143 Mo. App. 416, 417 (1910), and other cases cited, *supra*, p. 19. That Illinois law would be applied to the original notes is further indicated by the fact that the bank's contemporaneous agree-

[7] As regards accommodation paper, the rule of the Restatement of Conflict of Laws, Sec. 320, is that the place of contracting is the place of first delivery for value to a third person. Compare Secs. 312, 313. See *Tilden* v. *Blair*, 21 Wall. 241. This comports with the Missouri view that the place of contracting is the place where the last act necessary to give rise to a contract is performed. *Illinois Fuel Co.* v. *M. & O. R. R. Co.*, 319 Mo. 899, 923 (1928). The concurring opinion in *Hauck Clothing Co.* v. *Sharpe*, *supra*, 394, treats the place of first negotiation for value as decisive in the case of accommodation paper. We have found no Missouri decision either squarely supporting or conflicting with that view.

ment with petitioner not to demand payment of the notes and to return interest payments was both executed and delivered in Illinois (R. 36–37, 46–47).

Secondly, even if it were assumed that petitioner's liability on the original notes was controlled by Missouri law, it would not follow that the same law would be applicable with respect to the note in suit. According to Missouri law the renewal of a contract ordinarily is governed by the same law as controlled the original, though executed in a different state. See *Hansen* v. *Duvall*, 335 Mo. 59, 74 (1933).[8] The original notes herein, however, never became contracts, since they were not negotiated. Moreover, under Missouri law a renewal note may stand as a new contract and be construed independently of the note it replaced.[9] The note sued upon herein varied the terms of the original notes, since it carried a different rate of interest from that specified in

[8] In the case of a formal renewal contract, the rule of the Restatement is that "the place of contracting is where the new document is at the time when the old contract ceases to exist by the law of the place of its performance" (Sec. 313).

[9] *Siemans & Halski Electric Co.* v. *Ten Broek*, 97 Mo. App. 173, 175–176 (1902); *Cantley* v. *Plattner*, 228 Mo. App. 411, 419 (1934). Cf. *Walker* v. *Dunham*, 135 Mo. App. 396, 409 (1908). The surrender of an accommodation note prior to negotiation does not, of course, constitute consideration for a renewal. *Farmers Bank* v. *Harris* (Mo. App.), 250 S. W. 946 (1923); *Ford* v. *Ford Roofing Products Co.* (Mo. App.), 285 S. W. 538, 541 (1926); *Massa* v. *Huehnerhoff* (Mo. App.), 59 S. W. (2d) 723, 725 (1933).

one of them, contained a provision for attorneys' fees not found in either of the original notes, and was made payable in Illinois. Hence it is reasonable to suppose that the Missouri courts would treat the note as one standing on its own, as did the courts below (R. 75, 89), and would determine the applicable law accordingly, especially since the note was negotiated and the originals had not been and hence never became contracts (footnote 6, *supra*, p. 19).

II

THE COURT BELOW PROPERLY TOOK JUDICIAL NOTICE OF THE LAW OF ILLINOIS WITHOUT PLEA OR PROOF NOTWITHSTANDING THE MISSOURI RULE THAT JUDICIAL NOTICE MAY BE TAKEN OF THE LAWS OF SISTER STATES ONLY IF PLEADED

As its principal contention, at least in point of novelty, petitioner urges (Pet. 3–4, 5, 15–20) that in any event the court below erred in applying Illinois law when such had not been pleaded or proved in the district court. The basis of this argument is that in the Missouri courts the laws of sister states, unless pleaded and proved, are presumed to be the same as those of Missouri, and that this rule is one of substance and hence within the scope of *Erie R. Co.* v. *Tompkins*.

In its petition for certiorari (pp. 4, 6, 17), petitioner invoked the decision of the Circuit Court of Appeals for the Third Circuit in *Waggaman* v. *General Finance Co.*, 116 F. (2d) 254, as authority in conflict with the holding of the court below. A

subsequent decision of the Third Circuit, however, holds that the power of the federal courts to take judicial notice of the laws of the states is unaffected by the doctrine of the *Tompkins* case. *Gallup* v. *Caldwell*, 120 F. (2d) 90, 93–94. See also *Cray, McFaun & Co.* v. *Hegarty & Co.*, 27 F. Supp. 93–95 (S. D. N. Y.). To the extent that the *Waggaman* decision conflicts with that of the court below and has not been overruled, we submit that it should be disapproved.

A. THE FEDERAL COURTS HAVE HERETOFORE TAKEN JUDICIAL NOTICE OF THE LAWS OF THE SEVERAL STATES. AS A GENERAL RULE THE STATE COURTS OF MISSOURI, HOWEVER, MAY NOTICE THE LAWS OF A SISTER STATE ONLY IF PLEADED

For over a century, at least since *Owings* v. *Hull*, 9 Pet. 607, 625 (1835), it has been settled that in cases arising in the federal courts: "The law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof". *Lamar* v. *Micou*, 114 U. S. 218, 223; and cases cited in the footnote.[10] See also *Course* v. *Stead*, 4 Dall

[10] *United States* v. *Turner*, 11 How. 662, 668; *Pennington* v. *Gibson*, 16 How. 64, 81; *Cheever* v. *Wilson*, 9 Wall. 108, 121; *Brown* v. *Piper*, 91 U. S. 37, 42; *Elwood* v. *Flannagan*, 104 U. S. 562, 568; *Hanley* v. *Donoghue*, 116 U. S. 1, 6; *Roberts* v. *Reilly*, 116 U. S. 80, 96; *Fourth National Bank* v. *Franklyn*, 120 U. S. 747, 751; *Gormley* v. *Bunyan*, 138 U. S. 623, 635; *Union Pacific Railway* v. *Wyler*, 158 U. S. 285, 296; *Mills* v. *Green*, 159 U. S. 651, 657; *Bowen* v. *Johnston*, 306 U. S. 19, 23.

22, 27 (1800). In the federal courts questions both as to the "existence" (*Town of South Ottawa* v. *Perkins*, 94 U. S. 260, 269, 277) and as to the interpretation of the laws of any state (*United States* v. *Turner*, 11 How. 663, 687–688) are for the courts. And since the laws of every state are regarded as "domestic laws" (*Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 448; cf. *Hanley* v. *Donaghue*, 116 U. S. 1, 6), their "existence" and legal effect may be proved by judicial notice.

Application of the Federal rule accordingly has not been dependent upon the existence of a similar one in the state of the forum, but has generally been without regard to whether state courts would take judicial notice. The rule antedates *Swift* v. *Tyson*, 16 Pet. 1 (1842), and the Court has indicated its continued adherence to it after the decision in the *Tompkins* case. *Bowen* v. *Johnston*, 306 U. S. 19, 23. The only exception to the rule has been that on appeal from or writ of error to a state court which treats the laws of other states as matters of fact to be alleged and proved, this Court does not take judicial notice, but determines the validity of the decision of the state court on the same facts and law as were available to it. *Hanley* v. *Donoghue*, 116 U. S. 1, 6; *Adam* v. *Saenger*, 303 U. S. 59, 63. Obviously the exception is not applicable in the instant case.

The Missouri rule differs from the federal. Prior to 1927 it was necessary in the courts of

that state to prove as a "fact" the existence of any sister state law relied upon, as in the case of the law of a foreign country. Because sister state law was regarded as a "fact" which the local courts were not presumed to know, it was required to be pleaded to the same extent required by local pleading practice in the case of other facts not judicially noticed. The requirement of pleading and proof was not a rule of conflicts; it became an issue only after the Missouri court had ascertained that the law of some other state was applicable.[11]

The rule was not based on the view that the jury was best qualified to pass on questions of sister state law. While the existence of such law was viewed as a question of fact necessary to be proved to the jury, the construction and proper application of it, apparently including nonstatutory decision law, was recognized to be a matter of law to be decided by the court.[12] And where the law was shown by

[11] *Charlotte* v. *Choteau*, 25 Mo. 465, 473 (1857); *Charlotte* v. *Choteau*, 33 Mo. 194, 200 (1862); *Meyer* v. *McCabe*, 73 Mo. 236, 240 (1880); *McDonald* v. *Life Ass'n*, 154 Mo. 618, 628 (1900); *Coleman* v. *Lucksinger*, 224 Mo. 1, 14 (1909); *Norman* v. *Insurance Co.*, 237 Mo. 576, 583–584 (1911); *Rashall* v. *Railroad*, 249 Mo. 509, 516–517 (1913); *Banchor* v. *Gregory*, 9 Mo. App. 102, 104 (1880); *Flato* v. *Mulhall*, 72 Mo. 522, 525 (1880); *Sloan* v. *Terry*, 78 Mo. 623, 625 (1883); *Adamson* v. *Fogelstrom*, 221 Mo. App. 1243, 1246 (1927).

[12] *Slaughter* v. *Railroad*, 116 Mo. 269, 277 (1893); *Cobb* v. *The Griffith & Adams Co.*, 87 Mo. 90, 94 (1885); *Lowry* v. *Fire Ins. Co.*, 219 Mo. App. 121, 127 (1925); and cases cited in the preceding footnote.

uncontradicted documentary evidence, even its existence might be declared by the court. *Lowry* v. *Fire Ins. Co.*, 219 Mo. 121, 127; cf. *Charlotte* v. *Choteau*, 33 Mo. 194, 200 (1862). Nor was the rule based on any necessity of authenticating the printed reports of common law decisions and statute books commonly resorted to in proof of state law; printed reports of decisions were always admissible (*Charlotte* v. *Choteau*, 33 Mo. 194, 201) and, at least by statute, statute books of sister states purporting to be officially printed have likewise long been admissible. Mo. Rev. Stat., 1855, p. 723, sec. 2. As pointed out hereinafter (p. 40), it seems clear that the Missouri common law rule was based, as were similar rules elsewhere, on the early inaccessibility of the laws of other states.

In 1927, in recognition of present day conditions, Missouri enacted a statute (Laws 1927, p. 156; R. S. 1929, sec. 806) providing as follows:

> "Judicial Notice of Statutes and Decisions of Other States.—In every action wherein the law of another state of the United States of America is pleaded, the courts of this state shall take judicial notice of the public statutes and judicial decisions of said state."

Under this provision, if the statutory or common law of a sister state is pleaded, proof of it is unnecessary; judicial notice will be taken both of it and of decisions pertinent to it even though the latter are not pleaded. *Ramey* v. *Missouri*

Pac. R. R. Co., 323 Mo. 662, 675–676 (1929); *Menard* v. *Goltra*, 328 Mo. 368, 379, 380 (1931). However, if the law is not pleaded, it may not be noticed (*Gorman* v. *Terminal Ry. Co.*, 325 Mo. 326, 332–333 (1930); *Menard* v. *Goltra, supra*), unless the defect of pleading is waived by the parties. *Ramey* v. *Mo. Pac. R. R. Co.*, 323 Mo. 662, 675–676; *Neff* v. *Sovereign Camp, W. O. W.*, (Mo. App.) 48 S. W. (2d) 564, 570 (1932).

In the instant case Illinois law was not pleaded and there was no express waiver, although petitioner's memorandum (p. 7) in the district court, without raising the pleading point, alternatively argued that Illinois law precluded recovery. Cf. *Ramey* v. *Missouri Pac. R. R. Co., supra.* There may thus be presented the question whether the courts below were compelled by the doctrine of the *Tompkins* case to depart from the sensible and long-standing federal practice permitting and bind them to take judicial notice and were required instead to apply the rule of Missouri which its own highest court has called "absurd" and "archaic." *Gorman* v. *Terminal Ry. Co., supra.*

B. THE DOCTRINE OF *ERIE R. CO.* V. *TOMPKINS* DID NOT PRECLUDE THE COURTS BELOW FROM TAKING JUDICIAL NOTICE OF THE ILLINOIS LAW IN ACCORDANCE WITH TRADITIONAL FEDERAL PRACTICE

Petitioner contends (Pet. 16–20) that the underlying policy of the doctrine of the *Tompkins* case is to assure a uniformity of decisions as between state and federal courts sitting within the same

state and that under a proper application of the doctrine to effectuate this policy the courts below were required to disregard Illinois law and reach their decision solely upon the basis of the law of Missouri.

It is true that the rule of the *Tompkins* case is regarded as being based upon "the principle of uniformity" and the policy of "equal administration of justice in coordinate state and federal courts sitting side by side." *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 496; *Fidelity Trust Co.* v. *Field*, 311 U. S. 169, 180. However, the rule does not go so far as to require that the federal courts must in all cases of non-federal law limit themselves to exercise of the same powers as could be exercised by the local state courts if to do otherwise would lead to a different result than would be reached in the latter. Thus the rule has been said not to extend to so-called matters of "procedural law". *Sibbach* v. *Wilson & Co.*, 312 U. S. 1. See *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78; *Ruhlin* v. *N. Y. Life Ins. Co.*, 304 U. S. 202, 209. If the Missouri law precluding judicial notice in the absence of pleading were to be categorized as procedural rather than substantive for purposes of the *Tompkins* rule, the decision below accordingly would be affirmed.[13]

[13] The Supreme Court of Missouri has said that the judicial notice statute of 1927 states "a rule of procedure" and "only saves trouble, volume, and circumstantiality in pleading." *Maynard* v. *Goltra*, 328 Mo. 368, 381 (1931).

Otherwise put, it might be said that the Missouri rule could ordinarily have no material bearing on the outcome of litigation and that therefore the purpose of the *Tompkins* doctrine would not require that the federal courts be bound by the rule. Cf. Tunks, *Categorization and Federalism,* 34 Ill. L. Rev. 271, 278, 282, 301; Cook, *"Substance" and "Procedure" in the Conflict of Laws,* 42 Yale L. J. 333, 346; cf. *Coca-Cola Bottling Co.* v. *Munn,* 99 F. (2d) 190 (C. C. A. 4); *Sampson* v. *Channell,* 110 F. (2d) 754, 759–762 (C. C. A. 1). The plaintiff's opportunity of choosing the federal court would not of itself enable him to secure a more favorable decision than he could in the state court, since by a proper pleading in the latter he could assure that his rights would be determined by the same substantive law as would be applied in the federal court.

A closer analysis of the problem in the light of the scope of the Missouri and federal rules, respectively, will serve to strengthen the conclusion that petitioner's contention is untenable.

1. *The Missouri statute abrogated the common law requirement that the laws of sister states must be proved by the introduction of evidence, and left only the pleading requirement, which is inapplicable in the federal courts*

If the subheading is an accurate statement, as we submit that it is, the court below was clearly entitled to take judicial notice of the law of Illi-

nois. The situation would be the same as in a case where the statute of the state of the forum authorizes the taking of judicial notice but contains no provision as to pleading and is construed not to abolish the common law pleading requirement. Cf. *Richards* v. *Richards*, 270 Mass. 113 (1930); *Savannah Ry.* v. *Evans*, 121 Ga. 391 (1904). In such a case the pleading requirement presumably would be regarded as separable from the statutory authority to take judicial notice.

While the Missouri statute (*supra*, p. 26)[a] in terms purports to make the pleading of a sister state law a condition of resort to the statutory method of establishing or proving such law, as construed by the local courts its sole effect is to leave untouched the common law on the subject of pleading and to negative the conclusion which might otherwise have been drawn that because the "fact" could be noticed it need not be pleaded. Cf. *Loranger* v. *Nadeau*, 215 Cal. 362 (1932). The local decisions clearly indicate that where, under local pleading principles independent of the statute, failure to plead a sister state law may be deemed to be waived, judicial notice may be taken. *Ramey* v. *Mo. Pac. R. R. Co.*, 323 Mo. 662, 675–676 (1929); *Neff* v. *Sovereign Camp, W. O. W.* (Mo. App.), 48 S. W. (2d) 564, 570 (1932). And while the question has not and probably could not arise in the local courts, there is no reason to believe that they

would reach a different result where the federal pleading rules render the entire local pleading practice inapplicable. Cf. *Union Pacific Railway* v. *Wyler*, 158 U. S. 285, 296. The Missouri decisions cited make the reach of the pleading requirement depend on considerations applicable to pleading generally, not on those which underlie the particular method of proving "facts" of sister state law,[14]

In the view that the pleading requirement is separable and is all that remains of the Missouri common-law rule, there can be no serious question under the *Tompkins* case. It may not be contended that the Conformity Act (R. S. S. 914, 28

[14] Under Missouri common law, if the law of a sister state is a "substantive" or ultimate fact in the case, it must be pleaded, but not if it is only "evidentiary". *Banchor* v. *Gregory*, 9 Mo. 102, 104; see *Rashall* v. *Railroad*, 249 Mo. 509, 516. If "substantive" and not pleaded, it could not be proved on objection (*McDonald* v. *Life Ins. Co.*, 154 Mo. 618, 628), but like the failure to plead any other fact, the defect might be waived (*Ramey* v. *Mo. Pac. R. R. Co.*, 323 Mo. 662, 675; *Lowry* v. *Fire Ins. Co.*, 219 Mo. App. 121, 127). Whether "substantive" or "evidentiary", however, it was required to be proved since the court could not judicially notice "foreign" laws. *Rashall* v. *Railroad*, *supra*. On the other hand, the fact that the "common law" system prevails in Illinois may be judicially noticed and for such reason, apparently, this "fact" need not be pleaded; accordingly, applying the presumption that the Illinois common law is the same as in Missouri, the law of the latter will be enforced where as a matter of conflicts of law Illinois law is applicable and its common law rule is involved. *Rashall* v. *Railroad*, *supra*, at 517.

U. S. C., sec. 724) is applicable,[15] and this Court repeatedly has declared that the Rules of Decision Act (R. S. § 721, 28 U. S. C., sec. 725) does not apply to matters normally subsumed under the head of pleading, practice, and procedure. *Wayman* v. *Southard*, 10 Wheat. 1, 48; *United States* v. *Eckford*, 6 Wall. 484, 490.

That such matters were not intended to be included within the coverage of the latter Act is evident from the fact that contemporaneously they were dealt with in other statutes.[16] It is true that the Act has been held to apply to questions of evidence (*McNiel* v. *Holbrook*, 12 Pet. 84, 88–90; *Sims* v. *Hundley*, 6 How. 1) and that such ques-

[15] While the decisions of this Court holding that the federal courts may take judicial notice of the laws of the states have not referred in terms to the Conformity Act, they must be taken to hold that that statute does not require a contrary conclusion. And no principle of constitutional power or statutory construction can be suggested which would warrant a reconsideration of this question as an original one at the present time. The Act required conformity only "as near as may be" and exceptions were numerous. Moreover, the Act was repealed in large measure, if not wholly, by the promulgation of the Federal Rules of Civil Procedure under the Act of June 19, 1934 (48 Stat. 1064, 28 U. S. C. 723). See *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 10; Moore, *Federal Practice* (1938), p. 36; Tunks, *supra*, 288–290.

[16] Under The Process Acts of 1789 and 1792 (1 Stat. 93, 275, 276), the state practice and procedures of the state in which the federal court sat was made "applicable to every step taken in a cause * * * from its commencement to its termination" and to "the whole progress of the suit, and every transaction in it, from its commencement to its termination." *Wayman* v. *Southard*, 10 Wheat. 1, 27–29, 32.

tions, which are governed by the *lex fori* in the Anglo-American law (see Wigmore, *Evidence* (3d Ed.) sec. 5), may well be deemed "procedural" for many purposes, including judicial rule-making. See Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 Yale L. J. 622; Moore, *Federal Practice* (1938), pp. 41–42. But the Act never has been deemed applicable to questions of pleading. Cf. *United States* v. *Eckford*, *loc. cit. supra*; Simkins, *Federal Practice*, pp. 9–10.[17]

Moreover, the Federal Rules of Civil Procedure deal extensively with the subject of pleading (see Rules 7–12, 15; cf. Rule 16), and must be deemed to have been intended to provide the exclusive rule for pleadings in the federal courts. In line

[17] It is arguable that the same view may be reached on the ground that the Rules of Decisions Act applies only to matters of substantive right and merely announces the rule which would have been applicable in its absence. See *Wayman* v. *Southard*, 10 Wheat. 1, 48; *Hawkins* v. *Barney's Lessee*, 5 Pet. 457, 464; *Mason* v. *United States*, 260 U. S. 545, 559. This view finds support in the rationale of the *Tompkins* case and in the decision in *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 10–11, 13n. Such a limitation of the Rules of Decision Act, however, is very questionable, since it is settled that the Act requires the application of state statutes of limitations and rules of evidence, even where the substantive right and judicial jurisdiction is exclusively federal. *Campbell* v. *Haverhill*, 155 U. S. 610, 614–617. See also *McElmoyle* v. *Cohen*, 13 Pet. 312, 327; *Bauserman* v. *Blunt*, 147 U. S. 647, 652; *Brady* v. *Daly*, 175 U. S. 148, 158. And such a limitation is obviously inconsistent with the rule that the local conflicts rule is controlling. *Klaxon* v. *Stentor Co.*, *supra*.

with the abandonment of the notice pleading theory, the rules abolish the necessity of pleading all ultimate facts (see Rule 8) and favor the use of extremely general pleadings (see official Forms, Nos. 1-9), relying on other devices for the clarification of issues (see, e. g., Rule 16). The federal pleading system therefore is wholly incompatible with any state pleading system which, like that of Missouri, is based on the fact-law distinction from which the requirement of pleading the "fact" of the law of sister states is derived. The rules contemplate the possibility that an "official document or official act" may sometimes have to be pleaded (Rule 9 (d)), but this description hardly comprehends a state statute or decision invoked as the rule of any decision; any requirement of pleading such law must be derived, if at all, from the federal rules. No contention is made here that they impose any such requirement and, in view of the long established federal doctrine dispensing with such pleading, and in view of the purpose of the rules to simplify pleading practice, they cannot reasonably be construed to require an allegation of the laws of any state.

2. *Even if the abrogation of the Missouri common law rule of proof is conditioned upon the pleading of sister state law, the Tompkins doctrine did not preclude the federal courts from taking judicial notice of the Illinois law*

Alternative reasons why the above-stated result should be reached are (a) that since the ascertain-

ment of the law of any state as construed by its courts has been an historical function of federal judges and is a desirable one, neither the Rules of Decision Act nor the Constitution should be construed to limit them in the sources they may consult in performing this function; (b) that in the event they are limited by the rule of any state, it should be the rule of the state whose law is involved, in this case Illinois; and (c) that if the *lex fori* is chosen, it should be construed to permit the federal courts to notice the law of any state as "domestic" law. The Federal Rules of Civil Procedure, it should be noted, do not expressly touch the question of when a "fact" may be noticed without evidence, although the liberal rule (Rule 43 (a)) as to the form and admissibility of evidence provides that "the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed * * *".

(a) The conclusion that the federal courts are not compelled by any existing statute or by the Constitution to close their eyes to applicable state laws when there is a local rule requiring the state courts of the forum to do so finds support in the rule, consistently sustained by this Court without dissent, that state statutes which regulate the relations of court and jury and the exercise of judicial discretion in such matters are beyond the purview of the Conformity and Rules of Decision Acts and

need not be followed. In the most recent case on the subject, *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, the Court held that a provision of a state constitution which required the submission of the issue of contributory negligence to the jury in all cases was inapplicable in the federal courts and that the latter were free to direct a verdict in the exercise of their independent judgment. The Court said (pp. 94–95):

> The controlling principle * * * is that state laws cannot alter the essential character or function of a federal court. The function of the trial judge in a federal court is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the federal court under either the Conformity Act or the "rules of decision" Act. Thus, a federal court is not subject to state regulations * * * providing that the court shall not give an instruction to the jury unless reduced to writing, or that written instructions shall be taken by the jury in their retirement (*Nudd* v. *Burrows*, 91 U. S. 426, 441, 442; *Lincoln* v. *Power*, 151 U. S. 436, 442); or that the court shall require the jury to answer special interrogatories in addition to their general verdict (*Indianapolis & St. Louis R. Co.* v. *Horst*, 93 U. S. 291, 300); or that the court shall not express any opinion upon the facts (*Vicksburg & Meridian R. Co.* v. *Putnam*, 118 U. S. 545,

553), or charge the jury with regard to matters of fact (*St. Louis, Iron Mountain & Southern Ry. Co.* v. *Vickers*, 122 U. S. 360, 363); or shall not direct a verdict where the evidence is such that a verdict the other way would be set aside (*Barrett* v. *Virginian Railway Co., supra*).

No reason can be suggested why the power of a federal court to take judicial notice without plea or proof should be regarded as being any less independent of state law than is its power to direct a verdict or otherwise superintend the jury.[18] In ascertaining and determining the existence or construction of a "law" the federal courts have usually considered that they are at liberty to consult whatever sources they deem accessible and reliable, without regard to whether the local courts would take the trouble to do likewise. See *Gardner* v. *The Collector*, 6 Wall. 499, 511; *Brown* v. *Piper*, 91 U. S. 37, 41; *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 548; cf. *Town of South Ottawa* v. *Perkins*, 94 U. S. 260, 268–269, 277 n. This Court has assumed as much in taking judicial notice of state laws without reference to the local state practice. *Bowen* v. *Johnston*, 306 U. S. 19, 23; *Lamar*

[18] Neither in the *Herron* case nor in any of the cases cited therein did the Court base its decision on the constitutional requirement of trial by jury, and it is unlikely that such requirement would have precluded application of each of the state laws involved. Cf. *Patton* v. *United States*, 281 U. S. 276, 288.

v. *Micou,* 114 U. S. 218, 223; *Owings* v. *Hull,* 9 Pet. 607, 625.

Concededly there is precedent that in some circumstances state judicial-notice laws should be followed. This is found in cases where the question was whether a state act of the forum was "private" as distinct from "public" and hence not within the usual scope of the federal judicial notice rule (see *Leland* v. *Wilkinson,* 6 Pet. 317, 321), and where application of the state rule had the effect of permitting judicial notice to be taken. See *Railroad Co.* v. *Bank of Ashland,* 12 Wall. 226, 230; *Covington Drawbridge Co.* v. *Shepherd,* 20 How. 227, 232; *Case* v. *Kelly,* 133 U. S. 21, 27–28. The decisions in these cases can be interpreted to require that the rules of the state whose "substantive" law is concerned should be followed on the question whether the text is authentic, on the ground that it is necessary to do so in order to enforce the "substantive" law of such state. Cf. *Town of South Ottawa* v. *Perkins,* 94 U. S. 260, 268–269, 277, *n.*; *McNiel* v. *Holbrook,* 12 Pet. 84, 88–90; see *infra,* p. 41. They should have no bearing, however, where, as here, the law involved is regarded as a "public" law in the state of its origin as well as elsewhere, is set forth in undeniably authentic printed volumes, and there is no question of availability.[19]

[19] The opinion in *Town of South Ottawa* v. *Perkins, supra,* expressly declares that the federal court may notice and examine a state law even though the courts of that state would

Absurdities would ensue if the *Tompkins* doctrine were extended to compel the federal courts to follow local rules which would preclude them from taking judicial notice of the laws of sister states. Such an extension could only be based on the theory that state law is controlling on all rules of evidence not covered by federal statute. If so, it would seem in principle that the same law would govern the power to take judicial notice in many cases involving federal questions where this Court has in the past informed itself by such means as it deemed best, without regard to local state practice on like matter. It would in principle apply to the scope of judicial notice in cases involving political questions, where this Court has heretofore felt free to consult the State Department (Cf. *Jones* v. *United States,* 137 U. S. 202, 216), and perhaps even in cases involving constitutional questions turning on issues of fact. Cf. *Chastelton Corp.* v. *Sinclair,* 264 U. S. 543, 548.

Other absurd consequences readily suggest themselves. This Court has frequently taken judicial notice of its own records and held that other fed-

---

not trouble to do so unless the law was called to their attention by formal proof, and the statement that a state may declare what shall be taken as conclusive evidence of the local law apparently does not mean that such "evidence" may not be examined by the federal court unless it is formally read into the record. 94 U. S. at 268–269. The subsequent direction issued by the Court in that case was plainly not intended to modify the original opinion. *Id.* at 277, n.

eral courts may do likewise. See, e. g. *National Fire Ins. Co.* v. *Thompson,* 281 U. S. 331, 336; *Freshman* v. *Atkins,* 269 U. S. 121; *Dimmick* v. *Tompkins,* 194 U. S. 540. The rule in Missouri is otherwise (*State ex rel St. Joseph Water Co.* v. *Eastin,* 270 Mo. 193; *Banks* v. *Burnam,* 61 Mo. 76) ~~(1875,~~ but it is inconceivable that the federal courts could be required to consult state practice on this matter. If they must, the consequence might be that in many states the federal courts could notice records of the state courts (because the latter could), but could not notice their own records (because the state courts could not). Similar absurdities would arise where state and federal practice differed as to the scope of judicial notice in the case of federal or state administrative regulations or decisions.

The fact is that the rule of one court as to judicial notice of state laws has very little practical relevance in any other court. The requirement of proof is not based on doubts as to the authenticity of the copies of the statutes or decisions of the other states. In Missouri and elsewhere purported official and even privately printed copies of judicial decisions are admissible (*Charlotte* v. *Chouteau,* 33 Mo. 194, 201; Mo. Rev. Stat. 1919, sec. 5388), statutes purporting to be officially printed are likewise admissible (Mo. Rev. Stat. 1919, sec. 5336; see Wigmore, *supra,* at sec. 1684), and the state courts frequently refer to the decisions and

statutes of other states in construing their own laws. Undoubtedly the only basis of the rule requiring evidence was that for some time copies of the state decisions and statutes of sister states were not readily accessible. See *Motor Co.* v. *Warren*, 113 Kansas 44, 46; (Note) 46 Harv. L. Rev. 1019. Cf. Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 47 Yale L. J. 194, 211–212. Whether any state court should adhere to the rule after the reason for its existence has disappeared is a question for such court to decide for itself. But a consideration of the original basis of the rule is persuasive that it has no application to a court which is satisfied that it has sufficient access to the relevant state statutes and decisions.

(b) If the rule of some state must be applied notwithstanding the foregoing considerations, it should be the rule of the state whose law is involved.[20] In the only case heretofore decided by this Court in which it appeared that a choice of state rules on judicial notice would have made any difference, the Court indicated that it would choose the rule of the state whose law would be applied. *Pennington* v. *Gibson*, 16 How. 64, 75, 80-81. There is nothing in the Rules of Decision Act to require a contrary conclusion and every consideration of practical convenience favors it.

---

[20] The courts of Illinois, of course, may notice Illinois laws both written and unwritten, without plea or proof. L. 1929, p. 466.

The Act does not specify which state law shall be applied. It merely declares that the laws of the "several states" shall be regarded as rules of decision "in cases where they apply." The language of the statute in this respect stands in marked contrast to that employed in statutes making state law applicable in matters of practice, procedure, etc. In the case of every such statute which has come to our attention the Congress specifically made applicable the law of the state in which the federal court is sitting. This is true, for example, of the Process Acts of 1789 and 1792 (1 Stat. 93, 275–276) and also of the Conformity Act. It thus seems clear that in the Rules of Decision Act Congress left it open to the courts to choose the state, if any, whose law should be applied.

The opinion in the *Klaxon* case, as we read it, lends support to this view. The decision was premised in the view that both New York and Delaware could lawfully enforce their own rules of law and notions of policy, and the Court did not purport to find any provision in the statute which prescribed an exclusive rule as a basis for making a choice of such state laws by the federal courts. The decision was not based on the provisions of the Rules of Decision Act; the statute was not even mentioned in the opinion. The Court adopted the view that in diversity case the federal courts sit to administer the law of the particular states in

which they sit, a view which accords with the purpose of the constitutional grant of jurisdiction to ensure equality to non-citizens, not inequality to citizens. See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 83–84.

The policy considerations which underlie the rule of the *Klaxon* case are not of universal application, however. Thus it is well settled that the Rules of Decision Act requires the application of state statutes of limitation and rules of evidence even in cases where the substantive right to be enforced is federal in origin and the jurisdiction of the federal courts is exclusive. *Campbell* v. *Haverhill*, 155 U. S. 610, 614–617; *Brady* v. *Daly*, 175 U. S. 148, 158; *McClaine* v. *Rankin*, 197 U. S. 154, 158; *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390, 397; *O'Sullivan* v. *Felix*, 233 U. S. 318, 322; *Vance* v. *Campbell*, 1 Black 427; *Wright* v. *Bales*, 2 Black 535. These decisions proceed on the view that a contrary conclusion would lead, in the statute of limitations cases, to the absurd conclusion that no limitation of time for commencement of actions would exist in the absence of a federal statute on the subject.

If the state law of the forum may be made applicable under the Rules of Decisions Act where no danger of inequality of justice in coordinate state and federal courts exists, by a parity of reasoning the law of the state whose substantive

law is being enforced may be selected as controlling where the choice of the *lex fori* would lead to an absurd result. Such would be the consequence of choosing the local *lex fori* here. See *supra,* pp. 38–40.[21]

(c) If, however, the *lex fori* must be applied, it should not be deemed to require a mechanically literal application. The rule in every state is that "domestic" law may be noticed. What is "domestic" law in the state courts is not necessarily "domestic" law in the federal courts. The state rule treating the laws of sister states as "foreign" law is derived from the theoretical legal independence of each of the sovereign states. But the relationship between the Federal Government and each of the states is not the same legal relationship as that of the respective states to each other. Each of the states is a component part of the Union, even though a sovereign entity distinct from every other state. If such technical considerations may govern the reach of judicial notice, as they have in the past, then they must be applied with reference to the "facts" of the legal situation (cf. Thayer, *Law and Fact in Jury Trials,* 4 Harv.

[21] In this connection, it may be noted that the first case to extend the Rules of Decision Act to matters of evidence proceeded on the ground that rules of evidence were so closely related to the enforcement of the substantive right that the latter could not be properly enforced unless the rules of evidence of the same state were also enforced. See *McNiel* v. *Holbrook*, 12 Pet. 84, 88–90; and *supra*, p. 38.

L. Rev. 147, 172) as it actually exists in the federal courts. The federal courts may sit to enforce the local state law, but they remain arms of the Federal Government, not of the states.

III

PETITIONER IS ESTOPPED TO DENY LIABILITY ON THE NOTE

We have thus far shown that the rights of the parties are governed by Illinois law and that therefore respondent has the status of a holder in due course and is entitled to recover even if the note was given without consideration. An alternative ground for affirmance of the judgment below, and one which involves no question of a remand, is that under federal statutory law, as well as under Illinois law which the Missouri courts would be bound to apply under the Full Faith and Credit Clause, petitioner is estopped to assert as a defense that there was a lack of consideration for the note or an agreement not to demand payment of it. The question arising under the federal statute is independent of any issue of Missouri law and hence may be sustained whether or not the Court upholds or passes upon Points I and II. *Deitrick* v. *Greaney,* 309 U. S. 190. The question arising under the Full Faith and Credit Clause may depend on the decision of Point II, since the Illinois law relied on was not pleaded or formally proved. Cf. *Gasquet* v. *Lapeyre,* 242 U. S. 367;

Bothwell v. *Buckbee, Mears Co.*, 275 U. S. 274, 279. The district court concluded that petitioner was estopped to assert want of consideration (R. 71). The court below did not decide the question.

The facts establishing an estoppel are as follows: On August 1, 1926, two bonds which petitioner had sold to the bank matured and were dishonored (R. 38, 42, 68). The bank, which for many years had been a customer of petitioner (R. 42), requested it to execute two demand notes in the respective amounts of the bonds for the accommodation of the bank, in order that the bank's records would not show any past due paper (R. 42–44, 47, 68, 71). Petitioner's representative in the negotiations understood what was meant by the bank's desire not to have past due paper showing on its books (R. 47, 68), and he knew that the bank, which was organized under the laws of Illinois (R. 15), was subject to periodic examination by the State Bank Examiner (R. 44). Petitioner's vice president also understood the purpose of the bank's request (R. 55). Yet he signed the notes which were asked (R. 57, 59).

Petitioner thereafter continued to do business with the bank (R. 42, 52, 68). It executed one or more renewal notes prior to the note sued upon, which was dated January 1, 1933, and was executed in compliance with a request from the bank that a new note should be given because the note

or notes then held had become too old (R. 35, 52, 70). Between August 1926 and March 1932 petitioner paid the bank $1,601.56 "interest" on the notes (R. 49, 69–70). Petitioner's vice president understood that these payments were made to enable the bank to show the note or notes as live assets (R. 55–56, R. 71). The bank intermingled the interest payments with its general earnings (R. 49, 70).

The note in controversy was not written off the bank's books until July 29, 1935 (R. 21, 70). Prior to that date, on January 1, 1934, respondent, on application of the bank, insured all deposits in the bank up to $5,000 (R. 28). Respondent was required by paragraph (y) of Section 12B of the Federal Reserve Act (Appendix, *infra*, pp. 59–61) to make an examination of the financial condition of all state banks prior to granting insurance and there is nothing to show that it failed to perform its official duty (see R. 28; *Deitrick* v. *Greaney*, 309 U. S. 190, 196. Thereafter, respondent twice examined the bank prior to the date on which the note was written off (R. 21). The bank's separate agreement not to enforce the note was at all times kept in petitioner's custody (R. 46) and respondent did not become aware of it until demand was made on the petitioner for payment in 1938 (R. 61, 69). At no time did petitioner warn either the state banking authorities or respondent of the true character of the note (R. 52, 56, 69, 71).

On these facts, which we believe will not be disputed, petitioner is estopped to deny liability. This is so both under federal and Illinois statutory law applicable whatever the law of Missouri may be.[22]

1. *Petitioner is estopped under federal statutory law*

The statutory basis for an estoppel under federal law is found in Section 12B of the Federal Reserve Act (Appendix, *infra*, pp. 58–61) providing for federal insurance of bank deposits. Section 12B was added by the Banking Act of 1933 (48 Stat. 162) which dealt primarily with the insurance of deposits in national banks and state banks which were members of the Federal Reserve System. Subdivision (y) provided that state banks which were not members of the Federal Reserve System could be admitted to the benefits of the insurance only upon approval of state authorities having supervision of such state bank, certification by such authorities that the bank was in a solvent condition, examination by and approval of respondent, and agreement to comply with the re-

[22] If the decision in *Chicago Title & Trust Co.* v. *Brady*, 165 Mo. 197 (1901) were applicable, petitioner would not be estopped according to Missouri law. However, the opinion in *Bank of Slater* v. *Union Station Bank*, 283 Mo. 308, 319 (1920), indicates that the *Brady* decision might well be overruled if the opportunity were presented. See also *Lewis* v. *McMahon & Co.*, 307 Mo. 552, 574 (1925).

quirements of respondent. Subdivision (s) made it a criminal offense for anyone to overvalue any security wilfully for the purpose of influencing the action of respondent.[23]

Inasmuch as the Belleville Bank & Trust Company, a nonmember state bank, was insured on January 1, 1934, it may be presumed that prior

[23] Section 12B was amended by the Banking Act of 1935 (49 Stat. 713, 12 U. S. C. 264), enacted August 23, 1935. Subdivision (e) (2) of the amended Act provides that every national bank and every state bank which is a member of the Federal Reserve System shall be an insured bank. Subdivision (f) (1) provides that every state bank which was insured on June 30, 1935, should without more continue to be an insured bank. Subdivisions (f) (2) and (g) provide that, in all other instances, before a state bank may become an insured bank, its application must be accepted by respondent, which must give consideration to the financial history and condition of the bank, the adequacy of its capital structure and its future earning prospects, the general character of its management and the needs of the community which it serves. Subdivision (r) (1) provides that when respondent finds an insured state bank has conducted unsafe or unsound practices, or has negligently permitted any of its officers or agents to violate any provision to which the bank is subject, notice thereof shall be given to the state authority having supervision of the bank. If the practice or violation is not corrected, respondent may terminate the status of the bank as an insured institution. Subdivision (k) (2) provides for the thorough examination of all insured banks and for full and detailed reports. Subdivision (u) makes it a criminal offense to practice deceit upon any officer, auditor, or examiner of respondent. Subdivision (v) (7) authorizes the publication of reports criticizing the practices of insured banks when such practices are not corrected. The provisions of the original subdivision (y) were dropped and those of (s) were retained.

to that date the state authorities had certified that the bank was in a solvent condition, and that an examination by respondent had been made as the Act required. See *Deitrick* v. *Greaney*, 309 U. S. 190, 196; F. D. I. C. Annual Report, 1934, pp. 14, 15. Whether or not respondent placed any reliance on the instant note in insuring the bank, however, is immaterial, as is the question whether respondent or any creditor was damaged as a result of the bank's obtaining or use of it. *Deitrick* v. *Greaney, supra.*

In the *Deitrick* case this Court held that the maker of an accommodation note executed to conceal a stock purchase transaction forbidden by the National Banking Act was estopped on the ground of public policy to deny lack of consideration in a suit by a receiver of the payee national bank. Specifically rejecting the argument that it was necessary to prove an equitable estoppel, the Court held that "It is the evil tendency of the prohibited acts at which the statute is aimed, and its aid, in condemnation of them, and in preventing the consequences which the act was designed to prevent, may be invoked by the receiver representing the creditors for whose benefit the statute was enacted" (309 U. S. at 198–199).

In the *Deitrick* case, it is true, reliance was placed on the fact that the maker of the note was a participant in an illegal transaction. However, the Court did not base its decision on the ground

that the execution of the note, as distinguished from the bank's purchase of its stock, was within the express condemnation of the statute. In concluding that the concealment of the stock purchase by means of an accommodation note was unlawful, the Court relied on the purposes of the Act to prevent impairment of the capital resources of national banks and to insure prompt discovery of violations through periodic examinations and reports (309 U. S. at 195). Moreover, in deciding that the question presented was federal in character, the Court recognized that the "extent and nature of the legal consequences" of the implied statutory condemnation of the transaction in controversy were "left by the statute to judicial determination" in the light of the federal policy adopted in the Act. *Id.*, at 200–201; cf. *Board of County Commissioners of County of Jackson* v. *United States*, 308 U. S. 343, 349–351; *Awotin* v. *Atlas Exchange National Bank*, 295 U. S. 209, 214. The broad scope of the decision is made additionally manifest by the Court's reliance on a number of state decisions applying an estoppel in analogous circumstances (309 U. S. at 198). The policy and purposes, rather than the express prohibitions, of the state banking laws constitute the basis for the estoppel doctrine announced in these decisions.

If in the instant case the note had been executed subsequent to the enactment of Section 12B,

the decision in the *Deitrick* case would be clearly applicable. The provisions of Section 12B, construed to effectuate their purpose, impliedly forbid a promisor from denying liability as against respondent or its transferees on any transaction which was intended to misrepresent the true financial condition of an applicant for insurance or of an insured bank. The record shows that petitioner knew that the bank's design in obtaining and retaining the note was to have it, instead of the dishonored bonds, appear among the bank's assets (*supra*, pp. 45–46). And the inference is inescapable that petitioner's action in executing and delivering the note was intended to assist in concealing the true condition of the bank. An intent to deceive respondent or any other particular agency or person need not be proved. *Golden* v. *Cervanka*, 278 Ill. 409, 427 (1917). The "evil tendency" of the transaction to mislead banking authorities or others is sufficient. The danger of misleading the state authorities in this case would be especially pertinent, since Section 12B contemplated that respondent in issuing insurance to the bank would rely upon a certificate of solvency furnished by the state banking authorities as well as upon its own investigations.[24]

[24] The importance of state certificates is emphasized by the general scheme of the Banking Act of 1933. That Act contemplated that insured banks ultimately would be either national banks or members of the Federal Reserve System. Those classes of banks were already subject to adequate

The question whether petitioner is estopped under federal law thus turns on the significance of the fact that the note was executed prior, rather than subsequent, to the enactment of Section 12B. We submit that this fact is immaterial since the considerations of policy similar to those which were decisive in the *Deitrick* case are equally applicable in the circumstances of this case. Petitioner placed no limitation on the bank's use of the note. Cf. *Iglehart* v. *Todd*, 203 Ind. 427, 442 (1931); *State Bank* v. *Forsyth*, 41 Mont. 249, 270–71 (1910). Moreover, neither before nor after the adoption of Section 12B did petitioner notify any state or federal authority of the true character of the note or take any other effective step to assure that the bank would not succeed in misrepresenting its financial condition through use of the note. The statute should be construed in the light of relevant judicial doctrine (see *Deitrick* v. *Greaney*, 309 U. S. 196, 200–201), and it is a famil-

---

federal supervision, and it was unnecessary for the corporation to examine them. State nonmember banks were admitted to participation in the temporary insurance fund provided by Section (y) of the Act. Over half of the banks which became members in 1934 were state nonmember banks (F. D. I. C. Annual Rept., 1934, p. 176). Accordingly, it became necessary to assemble an examining force which had had widely divergent banking experience. By the end of 1933, 7,785 examinations had been conducted (*id.*, p. 15). In these circumstances, particular reliance was placed upon state certificates of solvency, as thereafter insurance was granted if the examination disclosed assets equalled liabilities (*id.*, p. 15).

iar principle that one who does an act which at the time involves no apparent risk of injury to another may be required to give warning when the danger of such injury becomes or should have become apparent. *Restatement of the Law of Torts*, § 321. This duty petitioner did not discharge (R. 53, 56), although concededly between 1930 and 1935 it several times endeavored to obtain a surrender of its notes from the bank in apparent recognition of the continuing risk it was taking, if not of the deception it had enabled.

A word should be added with respect to the effect of the bank's writing off of the note on July 29, 1935. It may be assumed that if the note had been written off prior to the application for insurance the effect might have been the same as the destruction of the instrument from the standpoint of the federal act. But the note was not written off until after respondent had insured the bank. The "evil tendency" of the note to mislead respondent in passing upon the application for insurance and in examining the bank in 1934 and 1935 (*supra*, pp. 46–47) obviously could not be undone by the subsequent writing off of the note.

2. *Petitioner is estopped also under Illinois law which the courts of Missouri would be bound to apply*

As a matter of Illinois law, petitioner likewise is estopped to deny liability. *Golden* v. *Cervenka*,

278 Ill. 409, 427 (1917); *Niblack* v. *Farley*, 286 Ill. 536, 540 (1919); *Central Republic Trust Co.* v. *Evans*, 307 Ill. App. 605, 641–643 (1940). As appears from the opinions in the cases cited, the basis of the Illinois rule, as in other states in which a like doctrine is enforced, is that the state banking statutes, which were in effect throughout the period involved in this case, construed in the light of their purpose and policy, impliedly preclude defenses such as that here asserted. This Court recognized as much in discussing the *Niblack* and similar decisions in the *Deitrick case*. 309 U. S. at 198. Compare *Knass* v. *Madison & Kedzie Bank*, 354 Ill. 554, 567–568 (1933). It is not controverted that the state statutory policy of protecting creditors and the public, on which the rule is based, is broad enough to include the protection of respondent as an insurer as well as others dealing with the bank on the strength of its ostensible sound condition.

Under the Full Faith and Credit Clause, the Illinois banking statutes, as thus construed, must be given effect by the state courts and therefore the federal courts in Missouri.[25] It is now settled that

[25] We have shown under Point II that the federal courts may take judicial notice of the laws of Illinois without plea or proof. The method of authentication provided by Congress where full faith and credit is sought (Rev. Statutes, secs. 905–906, 28 U. S. C. 687–688) is not exclusive. *Renaud* v. *Abbott*, 116 U. S. 277, 285; *Bothwell* v. *Buckbee, Mears Co.*,

a state statute is a "public" act within reach of the Full Faith and Credit Clause. *John Hancock Ins. Co.* v. *Yates*, 299 U. S. 178, 183. Cf. *Alaska Packers Association* v. *Commission*, 294 U. S. 532; *Pacific Insurance Company* v. *Commission*, 306 U. S. 493; *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145. And the statute must be enforced as construed by the courts of the enacting state. *John Hancock Ins. Co.* v. *Yates supra*, at 182–183; *Modern Woodmen of America* v. *Mixer*, 267 U. S. 544.

It is true that courts are not required to give effect to a statute of a sister state which is in conflict with the domestic policy on a matter of local concern. *Klaxon* v. *Stentor Company*, 313 U. S. 487, 497–498; *Alaska Packers Association* v. *Commission*, 294 U. S. 532. The financial soundness of state banks of Illinois, however, is not of concern to Missouri. The latter might conceivably have a sufficient interest in determining whether one of its citizens or residents in fact participated in a transaction condemned by the Illinois banking laws. Cf. *Pink* v. *A. A. A. Highway Express, Inc.*, No. 48, this Term, decided December 8, 1941. But petitioner's participation is here estab-

---

275 U. S. 274, 279 (1805); *Ohio* v. *Hinchman*, 27 Pa. 479 (1856); *Curtis* v. *Martin*, 2 N. J. L. 377; *Karr* v. *Jackson*, 28 Mo. 316 (1859).

lished; the sole question is the legal consequence of its admitted acts. And on this question Missouri has no interest whatever. Cf. *Pink* v. *A. A. A. Highway Express, Inc., supra.* There is not the slightest suggestion of such an interest in the Missouri cases heretofore cited by petitioner. The Missouri decisions (footnote 21, *supra,* p. 47) proceed on the technical ground that the receiver of a bank has no better right than the bank and that if the defense of no consideration would have been good against the bank, it is therefore available against the receiver. There is no indication of a domestic public policy in favor of encouraging deception or of protecting Missouri residents or citizens from the consequences of deception effected elsewhere. See *Chicago Title & Trust Co.* v. *Brady,* 165 Mo. 197, 209–210; *Farmers' Bank* v. *Harris,* Mo. App. 250 S. W. 946.

CONCLUSION

Although the court below did not purport to find the Missouri conflicts of law rule in accordance with the subsequent decision of this Court in the *Klaxon* case, it in fact correctly applied the rule, hence the error in not finding it was harmless. There is no occasion to delay final disposition of the case by remanding it for such a finding to be made. An independent reason for affirmance is that petitioner is estopped to deny liability on the note. Upon the

grounds stated the decision below is correct and should be affirmed.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
MELVIN H. SIEGEL,
H. G. INGRAHAM,
PAUL A. SWEENEY,
Attorneys.

FRANCIS C. BROWN,
JAMES KANE,
Counsel, Federal Deposit Insurance Corporation.

JANUARY 1942.

APPENDIX

Section 12B of the Federal Reserve Act, as added by Section 8 of the Banking Act of 1933, 48 Stat. 162, 168, 172, 177–178, 179, provides in part as follows:

> (a) There is hereby created a Federal Deposit Insurance Corporation (hereinafter referred to as the "Corporation"), whose duty it shall be to purchase, hold, and liquidate, as hereinafter provided, the assets of national banks which have been closed by action of the Comptroller of the Currency, or by vote of their directors, and the assets of State member banks which have been closed by action of the appropriate State authorities, or by vote of their directors; and to insure, as hereinafter provided, the deposits of all banks which are entitled to the benefits of insurance under this section.
>
> * * * * * *
>
> (j) Upon the date of enactment of the Banking Act of 1933, the Corporation shall become a body corporate and as such shall have power—
>
> First. To adopt and use a corporate seal.
>
> Second. To have succession until dissolved by an Act of Congress.
>
> Third. To make contracts.
>
> Fourth. To sue and be sued, complain and defend, in any court of law or equity, State or Federal.
>
> Fifth. To appoint by its board of directors such officers and employees as are not

otherwise provided for in this section, to define their duties, fix their compensation, require bonds of them and fix the penalty thereof, and to dismiss at pleasure such officers or employees. Nothing in this or any other Act shall be construed to prevent the appointment and compensation as an officer or employee of the Corporation of any officer or employee of the United States in any board, commission, independent establishment, or executive department thereof.

Sixth. To prescribe by its board of directors, bylaws not inconsistent with law, regulating the manner in which its general business may be conducted, and the privileges granted to it by law may be exercised and enjoyed.

Seventh. To exercise by its board of directors, or duly authorized officers or agents, all powers specifically granted by the provisions of this section and such incidental powers as shall be necessary to carry out the powers so granted.

* * * * *

(s) Whoever, for the purpose of obtaining any loan from the Corporation, or any extension or renewal thereof, or the acceptance, release, or substitution of security therefor, or for the purpose of inducing the Corporation to purchase any assets, or for the purpose of influencing in any way the action of the Corporation under this section, makes any statement, knowing it to be false, or willfully overvalues any security, shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both.

* * * * *

(y) The Corporation shall open on its books a Temporary Federal Deposit Insur-

ance Fund (hereinafter referred to as the "Fund"), which shall become operative on January 1, 1934, unless the President shall by proclamation fix an earlier date, and it shall be the duty of the Corporation to insure deposits as hereinafter provided until July 1, 1934.

Each member bank licensed before January 1, 1934, by the Secretary of the Treasury pursuant to the authority vested in him by the Executive order of the President issued March 10, 1933, shall, on or before January 1, 1934, become a member of the Fund; each member bank so licensed after such date, and each State bank trust company or mutual savings bank (referred to in this subsection as "State bank", which term shall also include all banking institutions located in the District of Columbia) which becomes a member of the Federal Reserve System on or after such date, shall, upon being so licensed or so admitted to membership, become a member of the Fund; and any State bank which is not a member of the Federal Reserve System, with the approval of the authority having supervision of such State bank and certification to the Corporation by such authority that such State bank is in solvent condition, shall, after examination by, and with the approval of, the Corporation, be entitled to become a member of the Fund and to the privileges of this subsection upon agreeing to comply with the requirements thereof and upon paying to the Corporation an amount equal to the amount that would be required of it under this subsection if it were a member bank. The Corporation is authorized to prescribe rules and regulations for the further examination of such State bank, and to fix the compensation of

examiners employed to make examinations of State banks.

* * * * * *

REVISED STATUTES OF MISSOURI, 1929, SECTION 806.

Judicial Notice of Statutes and Decisions of Other States.—In every action or proceeding wherein the law of another state of the United States of America is pleaded, the courts of this state shall take judicial notice of the public statutes and judicial decisions of said state. (Laws 1927, p. 156.)